Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	)	CC Docket No. 02-39

COMMENTS OF AT&T CORP.

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Pursuant to Rule 1.415, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits these comments in response to the Federal Communications Commission's ("Commission's") February 28, 2002 Notice of Inquiry ("*Notice*") regarding the equal access and nondiscrimination obligations of local exchange carriers.[1]

INTRODUCTION

The *Notice* asks "which, if any," of the incumbent local exchange carriers' longstanding obligations to treat all interexchange carriers and information service providers equally "should carry over to the present," *id.* ¶ 4, in light of "the many legal and marketplace changes that have transpired since the earlier requirements were adopted," *id.* ¶ 1. That is a very simple question to answer, because the fundamental need for the equal access and nondiscrimination requirements carried forward in Section 251(g) remains as strong today – if not stronger – as when these obligations first were adopted as part of the 1982 Modification of Final Judgment ("MFJ") that broke up the Bell System.

[1] *In re Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39 (rel. Feb. 28, 2002).

The equal access and nondiscrimination obligations were a necessary response to the most fundamental postulate of modern telecommunications regulation: *i.e.*, that the Bell Operating Companies ("BOCs") and other incumbent local exchange carriers ("ILECs") have both the ability and the incentive to abuse their control over the bottleneck local facilities that unaffiliated interexchange carriers ("IXCs") and information service providers ("ISPs") need to compete. As the MFJ court explained, comprehensive equal access and nondiscrimination obligations were therefore necessary "so that all interexchange and information service providers will be able to compete on an equal basis."[2]

Neither legal nor marketplace changes have – or could have – in any way undermined the basic economic principle that underlies this postulate. Nor has the passage of twenty years done anything to eliminate the BOCs' (and other incumbents') *ability* to engage in the discrimination that the equal access and nondiscrimination requirements were designed to prevent. Indeed, given that the BOCs and other incumbents still control the local loops and other facilities that serve the overwhelming majority of customers, the incumbents' continuing local market power is indisputable – *all* independent IXCs and ISPs remain dependent on access to the incumbents' local facilities.

Legal and marketplace changes have had a highly relevant impact on the BOCs' *incentives* to discriminate. But those changes – *i.e.*, the BOCs' significant and rapidly increasing provision of interLATA services pursuant to Section 271 – have greatly *enhanced* the BOCs' anticompetitive incentives by providing them with more opportunities than ever before to provide their own interLATA services that *directly benefit* from discrimination against

[2] *United States* v. *AT&T Co.*, 552 F. Supp. 131, 195 (D. D.C. 1982), *aff'd sub nom., Maryland* v. *United States*, 460 U.S. 1001 (1983).

unaffiliated IXCs and ISPs. Thus, not only do the BOCs unquestionably still wield local market power, but they also now have a more direct and powerful incentive to discriminate: to benefit their own long distance affiliates. Accordingly, the suggestion that the equal access and nondiscrimination requirements carried forward by Section 251(g) are a product of a different era and no longer serve the public interest must be dismissed out of hand.

In this regard, the *Notice* is simply wrong in suggesting that these safeguards were imposed solely to address concerns that "the BOCs would provide inferior interconnection to AT&T's competitors than to AT&T." *Notice* ¶ 11. That BOC argument, which was rejected by the courts more than a decade ago, makes absolutely no sense because divestiture largely eliminated the BOCs' ability to benefit from favoring AT&T. Thus, both the courts and the Commission have uniformly recognized that the equal access and nondiscrimination obligations were principally directed at reducing the risk that BOCs would abuse their market power over local facilities by (i) favoring *themselves* in those limited instances where the MFJ's line of business restrictions permitted them to do so, and (ii) favoring any unaffiliated IXC or ISP and sharing in the gains of that favoritism through some side deal.

Nor do the other rationales suggested by the *Notice* remotely justify lifting the restrictions carried forward by Section 251(g). *Notice* ¶ 11. The other provisions of Section 251, as Congress recognized, plainly are inadequate substitutes for the equal access and nondiscrimination protections, because they do not address critical issues such as joint marketing that are ripe for BOC abuse. The grant of Section 271 authority could not possibly serve as a rational trigger for eliminating equal access and nondiscrimination requirements. The Commission grants Section 271 authority upon a finding that a BOC's local markets are merely *open* to competition and without regard to whether the successful Section 271 applicant retains local market power (as all do) that provides both the incentive and ability to discriminate. Indeed, as noted above, a grant of Section 271 authority *enhances*, rather than diminishes, the need for strict enforcement of equal access and nondiscrimination requirements by increasing the opportunities for the BOC to directly benefit from discrimination against unaffiliated IXCs (and hence the BOC's incentives to engage in that misconduct). Nor are Sections 201 and 202 adequate substitutes for the equal access and nondiscrimination obligations carried forward in Section 251(g). These same statutory provisions were available when the equal access and nondiscrimination requirements were adopted, but such general admonitions to act reasonably were properly deemed to be inadequate.

In contrast, current market abuses by the BOCs, coupled with changes in the legal landscape, fully support additional steps by the Commission to protect consumers from anticompetitive discrimination. In particular, the Commission should continue and extend the equal access and nondiscrimination obligations applicable to joint marketing by BOCs on inbound calls from their local customers, especially where the BOCs have obtained authority to provide interexchange services under Section 271. Such restrictions should extend to requests by consumers to change their service and/or add additional lines, given the unexpected proliferation of such requests since the MFJ was entered. The evidence is clear that joint marketing efforts by the BOCs allow them to leverage their legacy monopoly positions in the local markets and thereby benefit from a unique marketing channel unavailable to their interexchange competitors. Similarly, given both the incentives for and evidence of this abuse, there now is a compelling need to adopt a neutral third-party administrator to ensure that the customer's preferred carrier choices, changes, freezes, and related issues are administered in a competitively neutral manner.

Changes in market conditions also support adoption of mandatory Customer Account Record Exchange ("CARE") regulations that would apply to all LECs (including all ILECs (BOCs and ICOs) and CLECs) and would require them to provide essential data regarding their customers to facilitate customer efforts to establish service, change their preferred carrier(s), record changes in their account information, and ensure proper billing. Adoption of such regulations would eliminate many disputes — and thus the need for regulation — regarding continued billing, "slamming," "cramming" or truth-in-billing requirements that now arise simply because, under the current voluntary system of industry standard "guidelines," carriers lack accurate and current customer information that they need to properly establish an account and bill accurately. At present, there is no other reliable alternative to timely and accurate customer account information.

Finally, for the same reason that it would be irrational to lift the equal access and nondiscrimination requirements that apply to the BOCs (and other incumbent LECs), it also would be irrational to extend them to nondominant carriers, which lack the BOCs' economic and infrastructure-based ability to undermine competition. That is why Congress expressly limited the scope of Section 251(g) to local exchange carriers that existed when it passed the 1996 Act (*i.e.*, incumbent LECs).

<u>ARGUMENT</u>

I. THE ECONOMIC AND REGULATORY RATIONALE FOR EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS CARRIED FORWARD IN SECTION 251(G) REMAINS AS SOUND TODAY AS EVER BEFORE.

The equal access and nondiscrimination obligations that were adopted in the MFJ 20 years ago and carried forward in 47 U.S.C. § 251(g) rest upon a rationale that was unassailable when the MFJ was entered in 1982 and remains so to this day: Whoever controls bottleneck local exchange facilities — through which all interexchange traffic must pass — has the ability to discriminate, in numerous ways, against or among interexchange carriers, and, if the bottleneck owner can benefit from such discrimination, it will discriminate, to the detriment of competition and consumer choice. So long as the precondition for that rationale — control over bottleneck facilities — remains, strict enforcement of equal access and nondiscrimination requirements likewise will remain essential to effective competition.

A. It Is Beyond Debate That Market Power Over The Local Exchange "Bottleneck" Creates The Ability To Undermine Interexchange Competition Through Discrimination.

From the outset of the antitrust suit that led to the MFJ, it was recognized that control over the local exchange bottleneck created the ability to discriminate, and that a company with the opportunity to discriminate would do so, in order to leverage that control into control of other markets. When the Government filed suit in 1974, it "alleged that AT&T used its control over its local monopoly to preclude competition in the intercity market." *United States* v. *AT&T Co.*, 552 F. Supp. 131, 161 (D. D.C. 1982), *aff'd sub nom., Maryland* v. *United States*, 460 U.S. 1001 (1983). Indeed, this was "[o]ne of the government's principal contentions," and the MFJ court found that "[t]here was ample evidence to sustain" it. *Id*. at 195.

The Court explained that the local monopolies had the ability to prevent long distance competition because they controlled a "strategic bottleneck position," *id*. at 171 — *i.e.*, the local exchange to which access was "essential" for a long distance carrier to complete a call, *id*. at 188. There were, due to this control, "many ways in which" the Bell System "could discriminate against competitors in the interexchange market." *Id*. at 188; *accord AT&T Corp.* v. *FCC*, 220 F.3d 607, 611 (D.C. Cir. 2000); *see* 552 F. Supp. at 160-62 (cataloging some of the possible abuses).

In addition to their ability to discriminate, the local monopolies also had an obvious "incentive to discriminate": "[T]hey would stand to gain business if other carriers were disadvantaged by poor access arrangements and high tariffs." 552 F. Supp. at 188; *id*. (BOCs providing interexchange service "would have substantial incentives" to discriminate). It was therefore "imperative" for the MFJ to ensure that "any disparities in interconnection be eliminated so that *all* interexchange and information service providers will be able to compete on an equal basis." *Id*. at 195 (emphasis added).

The Commission has shared and reiterated this elementary, fundamental economic understanding. In the *Non-Accounting Safeguards Order*,[3] for example, the Commission observed that the BOCs were "the dominant providers of local exchange and exchange access services in their in-region states." 11 FCC Rcd. 21,905, ¶ 10. It then drew the obvious conclusion:

> [A] BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive.

Id. ¶ 11. The Commission further observed that a BOC could use its dominant local position to discriminate in myriad ways, including discriminatory pricing, discriminatory quality of service,

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[3] First Report & Order and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21,905 (1996) ("*Non-Accounting Safeguards Order*").

and discrimination in the dissemination of information, all of which would have the same anti-competitive effect. *Id*. ¶ 12.

Thus, one of the chief remedies that the Government sought as early as 1974 was the divestiture of the BOCs from AT&T, 552 F. Supp. at 139, as a result of which AT&T, deprived of control of the bottlenecks, would have no ability to discriminate, and the BOCs, deprived of any involvement in long distance service, would "have no incentive to discriminate," *id*. at 165. But divestiture did nothing to eliminate the BOCs' control of the local bottlenecks, and it could not entirely eliminate their incentives to use that control to discriminate against unaffiliated IXCs and ISPs.

B. The MFJ And Decisions Applying It.

The Government's remedy for the problem of discrimination via control of the bottleneck was to strike first at the incentive to discriminate, by divestiture (depriving AT&T of any ability to discriminate) and by banning the BOCs from providing interexchange services, information services and certain other lines of business. *Id*. at 227-28 (MFJ § II.D). Although the BOCs' ability to discriminate would persist, this remedy would greatly diminish the "incentive" to do so. *Id*. at 171; *see id*. at 195 ("[A]fter divestiture the [BOCs] will no longer have the same incentive" to discriminate). The MFJ court further tied the line-of-business restrictions to the BOCs' chokehold on essential facilities by explaining that that they would be removed only "upon a showing that there is no substantial possibility that [a BOC] could use its monopoly power to impede competition." *Id*. at 195; *id*. at 231 (MFJ § VIII(C)).

But divestiture and the line of business restrictions could not entirely eliminate the BOCs' incentives to act on their ability to discriminate against unaffiliated IXCs and ISPs. The line of business restrictions were not absolute, and the BOCs retained limited opportunities to provide interLATA services that would directly benefit from discrimination against non-affiliates. Moreover, opportunities remained for the BOCs to collude with favored IXCs and ISPs and share in the illicit gains of discrimination. As the MFJ court explained, the BOCs could appoint themselves "the arbiter[s] of future inter-LATA services," shaping the market "to suit [their] needs or interests" and thereby frustrating competition. *United States* v. *Western Elec. Co.*, 846 F.2d 1422, 1428 (D.C. Cir. 1988) ("*FTS Case*") (*quoting id*., 583 F. Supp. 1257, 1259 (1984)).

That is why the Government also insisted that the MFJ impose "equal access" and "nondiscrimination" requirements on the BOCs. 552 F. Supp. at 227-28, 232-34; *see id*. at 142-43, 195-200. These requirements were to be "'construed broadly to encompass all potential areas of favoritism, subtle as well as overt.'" *Id*. at 142-43 (*quoting* DOJ Competitive Impact Statement at 26-27). They were, in the MFJ court's view, "[t]he key to interexchange competition," *id*. at 188, ranking in importance "closely behind the divestiture itself and the line of business restrictions on the Regional Companies." *United States* v. *Western Elec. Co.*, 698 F. Supp. 348, 368 (D. D.C. 1988) ("*Calling Card Case*").

The "equal access" requirements were designed to ensure that the BOCs do not discriminate in the provision of essential interconnection to the local exchange through the bottleneck (and related services). Each BOC was required to "provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates." 552 F. Supp. at 227 (MFJ § II.A). This "broad guarantee of equal treatment" promised to "effectively remove any interconnection-type obstacles to free competition." *Id*. at 196. It included the more specific requirements that (1) a customer be permitted to designate (or "presubscribe") a long distance carrier automatically to handle all of his long distance calls, and that (2) each BOC provide dialing parity, enabling access to any interexchange carrier "through a uniform number of digits." *Id*. at 233 (MFJ App. B(A)(2)(iii)); *see id*. at 197-98.

The "nondiscrimination" requirements prohibited any BOC from discriminating in several other critical areas:

> 1. procurement of products and services;
>
> 2. establishment and dissemination of technical information and procurement and interconnection standards;
>
> 3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and
>
> 4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

Id. at 227 (MFJ § II.B). In approving the reorganization plan, the MFJ court implemented these equal access and nondiscrimination requirements by requiring the BOCs to file written commitments that they would "provide equal access to the interexchange carriers with respect to all LATAs within [their] control, on a non-discriminatory basis, for intra-LATA [toll] as well as for inter-LATA traffic." *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 1009 (D. D.C. 1983); *see Calling Card Case*, 698 F. Supp. at 359 (reiterating this requirement).[4]

[4] Soon after approving the MFJ, the same court approved a consent decree in an antitrust suit against GTE Corp. that imposed on the GTE Operating Companies equal access and nondiscrimination requirements nearly identical to those imposed on the BOCs. *See United States* v. *GTE Corp.*, 603 F. Supp. 730, 731, 732-33 (D. D.C. 1984); *id.*, 1984 WL 2869, *6 (Dec. 21, 1984) (text of equal access and nondiscrimination requirements).

Thus, for more than a decade, the MFJ court applied these two sets of requirements to numerous "areas of favoritism, subtle as well as overt," 552 F. Supp. at 142, and, in doing so, repeatedly thwarted the BOCs' efforts to evade the MFJ. In the *Equal Access Case*, it barred "favoritism . . . to any particular carrier" whenever a customer phoned a BOC to obtain service, *United States* v. *Western Elec. Co.*, 578 F. Supp. 668, 677 (1983), and required each BOC to provide impartial and "reasonably detailed data" to the customer about his choices for long distance service, *id*. at 676. The Commission interpreted this decision to require the BOCs to list long distance carriers in random order and to provide the phone number of any requested carrier.[5] The MFJ court held in the *Endorsement Case* that a BOC could not, consistent with the MFJ's nondiscrimination requirement, provide an "endorsement of quality" or "endorsement of services" for any interexchange carrier.[6] And, in the *Calling Card Case*, the MFJ court struck down numerous forms of discrimination by BOCs relating to calling cards and public telephones.[7] The MFJ court specially noted that there is a double evil when the BOCs discriminate in providing information, as they were doing with validation data for completing calling card calls: First, the discrimination directly deprives interexchange companies of customers, and second, it causes "customer annoyance and discourages further attempts in other

[5] *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, 101 FCC 2d 935, 950 (1985); *id*., 101 FCC 2d 911, App. B, ¶ 117 (1985).

[6] *United States* v. *AT&T Co.*, C.A. No. 82-0192, slip op. at 3 & n.4 (Apr. 11, 1985); *see also In the Matter of AT&T Corp.* v. *Ameritech Corp.*, 13 FCC Rcd. 21438, ¶ 55 (1998) ("*Qwest Teaming Order*").

[7] 698 F. Supp. at 360-61, 367-68; *see United States* v. *Western Elec. Co.*, 739 F. Supp. 1, 10-13 (1990) (resolving outstanding issues from earlier decision). The judge overseeing the MFJ applied his decision in the *Calling Card Case* to the GTE Consent Decree, relying on it to hold that GTE had violated its equal access requirements by soliciting bids from interexchange carriers to provide the exclusive interexchange service for "0+" calls from GTE's public telephones. *United States* v. *GTE Corp.*, 1988 WL 150815, *1 (D. D.C., Dec. 23, 1988). GTE's proposal was fatally flawed because "the choice of the carrier would be made by GTE." *Id*.

contexts to use" the discriminated against carrier. *Id*. at 354; *see id*. at 353 ("[T]he [BOCs] must offer exchange access as well as billing services on an equal and nondiscriminatory basis").[8]

Furthermore, and as the *Endorsement Case* makes clear, the MFJ's restrictions on the BOCs did not simply aim to protect AT&T's competitors from AT&T. Rather, they focused on the BOCs, broadly barring any efforts by them to favor themselves by trading on their monopoly power over the local exchange. The MFJ court established this point early, holding in *United States* v. *Western Elec. Co.*, 583 F. Supp. 1257 (1984), that Pacific Bell had violated the MFJ by refusing to grant AT&T access to its lines for calls originating from AT&T's coinless public telephones. The MFJ court found Pacific Bell's action to "strike at [the] heart" of the MFJ, involving conduct that would permit a BOC to "shape the inter-LATA competition to suit its needs or interests," ultimately "frustrat[ing] such competition altogether." *Id*. at 1259. *See also* 552 F. Supp. at 194 (explaining that the BOCs had "the ability to leverage their monopoly power into the competitive markets"). AT&T was "in direct competition with Pacific Bell," 583 F. Supp. at 1259 n.10, and therefore deserved the same protection against the BOC's abuse of its bottleneck as did any other carrier.

The MFJ court reiterated this holding in the *FTS Case*, and the D.C. Circuit agreed. 846 F.2d 1422 (1988). U.S. West had offered to provide to the Federal Government's private telephone network ("FTS") discounts on access to local exchange facilities and certain free trunk lines if the FTS would purchase certain services and items from U.S. West. *See id*. at 1424, 1425. The discounts enabled U.S. West to undercut bids from interexchange carriers. *See*

[8] The MFJ court also rejected the BOC's argument that the MFJ's equal access provisions did not apply to local calling. 698 F. Supp. at 359 & n.54. The court had previously summarized the equal access provision as requiring, among other things, that the BOCs "provid[e] all interexchange carriers with identical information at an identical quality level." *United States* v. *AT&T Co.*, 604 F. Supp. 316, 323 (1985).

id. at 1425. The District Court had found U.S. West's practices "entirely inconsistent" with the MFJ's "basic scheme" of creating competition "on the basis of level playing fields." *Id*. at 1427 (*quoting* Dist. Ct. mem.). In affirming, the Court of Appeals concluded that the District Court was "clearly reasonable to read the MFJ's nondiscrimination provisions in light of its fundamental purpose to stymie efforts by a local monopoly to use its stranglehold on essential facilities and services to thwart competition." *Id*. at 1429. In concluding that U.S. West's provision of the free trunk lines involved discrimination in "exchange access," the court emphasized that "exchange access" was "defined extremely generously" in the MFJ, to prevent a BOC from "us[ing] its monopoly control of whatever services were excluded" from the definition of exchange access "to obtain an unfair competitive advantage over its rivals." *Id*. at 1430-31.

Taken together, the MFJ itself and the MFJ court's decisions established the simple yet critical rule "that BOCs may not favor an interexchange carrier by endorsing or promoting the services of one interexchange carrier over another." *Qwest Teaming Order* ¶ 57.[9] Or, as the MFJ court itself explained, the equal access and nondiscrimination provisions "were aimed at practices which favored a Regional Company's own operations over those of others, or favored one interexchange carrier or any other provider of goods or services over those of another provider of identical or similar goods and services, to the economic or financial advantage of some and the detriment of others." *United States* v. *Western Elec. Co.*, 1989 WL 108315, *3 (June 26, 1989).

[9] *In the Matter of AT&T Corp.* v. *Ameritech Corp.*, 13 FCC Rcd. 21438, ¶ 57 (1998).

C. The 1996 Act And § 251(g).

Congress passed the Telecommunications Act of 1996 to bring competition to the local telephone markets as quickly as possible. The 1996 Act also contemplates that the BOCs would enter into the long distance market once they have satisfied the requirements of Section 271. 47 U.S.C. § 271. Recognizing that this latter goal was contrary to the restrictions that the MFJ imposed on the BOCs, Congress provided that conduct previously governed by the MFJ would now be governed by "the restrictions and obligations imposed by the Communications Act . . . and shall not be subject to the restrictions and the obligations imposed by such Consent Decree." 1996 Act, § 601(a)(1), *reprinted in* 47 U.S.C.A § 152, note.

Congress, however, also recognized that immediate termination of the MFJ and other consent decrees would leave the interexchange market vulnerable to the BOCs' discriminatory exercise of their control over bottleneck facilities. It sought to address this problem in several ways. First, it expressly codified some of the MFJ's equal access and nondiscrimination obligations, such as those relating to interconnection, § 251(c)(2)(C), (D), and to dialing parity, § 251(b)(3). Second, recognizing that these and other provisions of the 1996 Act left wide gaps where the MFJ's equal access and nondiscrimination obligations had been, Congress filled the gaps with § 251(g). "'[B]ecause the [Act] completely eliminates the prospective effect of the [Consent Decrees], some provision is necessary to keep these requirements in place . . . . Accordingly, the conference agreement includes a new section 251(g).'" *WorldCom, Inc.* v. *FCC*, -- F.3d --, 2002 WL 832541, *4 (May 3, 2002) (*quoting* H.R. Rep. 104-458, at 123, *reprinted in* 1996 U.S.C.C.A.N. 124, 134) (second alteration by court).

The language, history and purpose of Section 251(g) make clear that Congress intended that it would protect ISPs and IXCs from the exercise of incumbent market power until the Commission promulgated regulations replacing the protections that the 1996 Act had terminated. As the D.C. Circuit recently explained, and as Section 251(g)'s title indicates, § 251(g) ensures "continued enforcement" of the "exchange access and interconnection requirements," including "the ones contained in the consent decree that broke up the Bell System." *WorldCom*, 2002 WL 832541, *4. It preserves the equal access and nondiscrimination requirements that were established for ISPs and LECs "under any court order, consent decree, or regulation, order, or policy of the Commission" prior to the passage of the 1996 Act. 47 U.S.C. § 251(g). In particular, § 251(g) provides in pertinent part:

> [E]ach local exchange carrier . . . shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding [passage of the 1996 Act] under any court order, consent decree, or regulation, order or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

Id. Thus, § 251(g) preserves the safeguards for competition that were included in the MFJ's equal access and nondiscrimination provisions, such as prohibitions on endorsing or favoring a particular interexchange carrier in a BOC's marketing or customer service, and the prohibition on using monopoly profits to cross-subsidize other areas of business through discounts. As the D.C. Circuit and Commission have recognized, Section 251(g) is simply "a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission." *Advanced Services Order*, 15 FCC Rcd. 385, ¶ 47[10]; *see also WorldCom*, 2002 WL 835241, *4.[11] Moreover, the "pre-existing 'restrictions and

[10] Order on Remand, *In the Matter of Deployment of Wirelines Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, ¶ 47 (1999).

obligations' are not limited to Consent Decree obligations" because "the statute itself explicitly embraces pre-existing obligations under a 'regulation, order, or policy of the Commission.'" *WorldCom*, 2002 WL 832541, *4 (quoting 47 U.S.C. § 251(g)).

The Commission has properly interpreted section 251(g) to "require[ ] the BOCs, both pre- and post-entry [to long distance markets], to treat all interexchange carriers in accordance with their equal access and nondiscrimination obligations, and thereby neutralize the potential anticompetitive impact they could have on the long distance market until such time as the Commission finds it reasonable to revise or eliminate those obligations." *Qwest Teaming Order* ¶ 5. Furthermore, the equal access and nondiscrimination requirements that § 251(g) preserves can be terminated only if the Commission expressly prescribes superseding regulations. The text of the provision unambiguously establishes this procedural mandate: The MFJ's requirements continue to apply "'until such restrictions and obligations are *explicitly superseded by regulations* prescribed by the Commission." 47 U.S.C. § 251(g) (emphasis added); *WorldCom*, 2002 WL 832541, *4 (noting that requirements of Section 251(g) continue in effect until "explicitly superceded"). Congress thus made clear that affirmative action on the part of the Commission must occur before a BOC could lawfully disregard its equal access and

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[11] Indeed, the Commission's decisions confirm that the section's protections are critical. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 362 (1996) (explaining that the "primary purpose of Section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent"); *US West Petitions to Consolidate LATAs in Minnesota and Arizona,* 12 FCC Rcd. 4738 ¶ 19 (1997), *aff'd*, 14 FCC Rcd. 14392 (1999) (stating that 251(g) provides Commission with exclusive authority to modify LATA boundaries); *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 70 (explaining that "[c]ontinuing enforcement of the MFJ equal access requirements and pre-existing Commission prescribed interconnection requirements, pursuant to section 251(g), also safeguards against BOC discrimination in favor of the affiliates of their merger partners").

nondiscrimination requirements. Congress wanted to ensure that the obligations reflected in § 251(g) would continue to apply until the FCC expressly and formally concluded, after a rulemaking in compliance with the Administrative Procedure Act ("APA") and with full opportunity for notice and comment, that these obligations were no longer necessary.

The Commission may only adopt new, superseding regulations pursuant to its authority under provisions of the Communications Act other than § 251(g), such as §§ 201 and 202. The Supreme Court has expressly held that § 251(g) is not a separate grant of authority to the Commission. *AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. 366, 381 & n.9 (1999) (explaining that § 251(g) is "not [a] grant[ ] of authority at all"). In addition, the Commission may only adopt such regulations to the extent consistent with any express requirements of the Act (such as §§ 251(b) and (c)). Of course, for any effort to supersede a requirement preserved in § 251(g) to be lawful under the APA, it would first be necessary for the Commission to determine and establish that the economic rationale for that requirement no longer exists—*i.e.*, that the BOCs no longer have the ability and incentive to discriminate, through local market power, in the area that the requirement covers. Indeed, the MFJ court's decision itself sets forth such a standard: "[A] restriction will be removed upon a showing that there is no substantial possibility that [a BOC] could use its monopoly power to impede competition in the relevant market." 552 F. Supp. at 195 (identifying standard for removing line-of-business restrictions on BOCs).

As demonstrated below, there is no possible basis for eliminating the equal access and nondiscrimination requirements at this time. Not only does the BOCs' historic *ability* to discriminate through their *de facto* monopoly over the local exchange bottleneck remain, but their *incentive* to discriminate has risen substantially. Indeed, under the 1996 Act, BOCs may enter the market for long distance service (upon satisfaction of Section 271's requirements) and they must compete for local service – often against the very companies with which the BOC is contending in the long distance market and which depend on the BOCs' facilities to compete in both areas.

II. THERE IS NO RATIONAL BASIS TO ELIMINATE THE EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS CARRIED FORWARD IN SECTION 251(G).

The fundamental economic and regulatory rationales necessitating the application of the equal access and nondiscrimination requirements to the BOCs remain true today because the BOCs continue to wield market power over bottleneck local exchange facilities, and their incentive to abuse that market power has, if anything, increased. Furthermore, the alternatives to the MFJ's protections suggested by the *Notice* – such as reliance on other provisions of Section 251 or Sections 201 and 202 – are inadequate substitutes. The existence of these provisions thus cannot justify the lifting of the existing equal access and nondiscrimination obligations.

A. The BOCs Retain Market Power Over Local Exchange Facilities And Have Increasing Incentives To Use It.

It is beyond serious dispute that the BOCs' ability to discriminate remains because they retain market power over local telecommunications facilities that are essential to interexchange carriers and information service providers. The bottleneck remains because "local competition is in its infancy." *Cox Iowa Telcom, LLC* v. *Qwest Corp.*, Docket No. FCU-02-1 at 9 (Iowa Util. Bd. 2002) (finding that CLECs have only 11% of the market). In no State has the chokehold of the BOCs over local exchanges and related services — particularly assisting customers who call to select long distance service — been broken. Their "persistence as dominant local exchange carriers," which existed in "the pre- and immediate post-MFJ time frame, . . . persists to the present day, even in states where the BOC has been allowed to offer long distance service." Declaration of Lee L. Selwyn on behalf of the AT&T Corp. (May 10,

2002) ¶ 9 ("Selwyn Decl.") (emphasis omitted). Nationally, the ILECs control about "94.5% of the residential/small business local service market in the areas where they operate." *Id*. ¶ 15. In the first two States where BOCs received § 271 approval, New York and Texas, BOCs still retain, by extremely conservative estimates, over 75% of the local market. *See Notice* ¶ 13 n.24; Selwyn Decl. ¶ 15. Indeed, the Commission's own data confirm the continued dominance of the BOCs over local telecommunications facilities that are essential to the provision of interexchange and information services.[12] As the Commission has explained, this situation is not surprising even where a "BOC has satisfied the requirements of section 271," because "the local exchange market will not be fully competitive immediately upon its opening." *Non-Accounting Safeguards Order* ¶¶ 9, 10.

Nor can there be any serious argument that the BOCs have lost their incentives to discriminate. To the contrary, their increasing opportunities to provide their own interLATA services have, if anything, strengthened their incentives to discriminate in favor of themselves and against others. BOCs are well aware of this opportunity to discriminate, as shown by their aversion to providing interLATA service outside the area of their local monopoly or even to customers of CLECs within that area. Selwyn Decl. ¶ 10. Where both the ability and incentive

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[12] *See* FCC, Industry Analysis Division, Common Carrier Bureau, *Trends in Telephone Service*, Table 8.2 (Aug. 2001) ("Telephone Loops of Incumbent Local Exchange Carriers by State"). Indeed, the BOCs' continuing dominance of the local facilities needed by interexchange carriers far exceeds their dominance of the market, because CLECs often depend on BOC facilities to provide much of their service, through the duties imposed on ILECs by § 251(c). Section 251(c) recognizes that the BOCs' bottleneck facilities "have natural monopoly characteristics" and that replicating them is and will be a arduous, slow, costly effort. *See* Declaration of Robert D. Willig ¶ 15 (Apr. 3, 2002), *In the Matter of Review of the Section 251 Unbundling Obligations of [ILECs]*, CC Docket No. 01-338. Thus, regardless of the actual market share of CLECs — which is, in any event, minimal — the bottleneck promises to remain for some time.

to discriminate exist, the equal access and nondiscrimination protections carried forward in Section 251(g) are essential to protecting competition.

The *Notice* suggests that the "equal access and nondiscrimination obligations" reflected in the MFJ were imposed solely "to respond to the concern that the BOCs would provide inferior interconnection to AT&T's competitors than to AT&T," and that this concern no longer exists. *Notice* ¶ 11. But, as explained above, that suggestion is demonstrably wrong. In its decision divesting AT&T of the BOCs, the MFJ court recognized that "after divestiture the [BOCs] will no longer have the *same* incentive to favor AT&T," but nevertheless concluded that restrictions on the BOCs' ability to discriminate were necessary because it "is imperative that any disparities in interconnection be eliminated so that *all* interexchange and information service providers will be able to compete on an equal basis." 552 F. Supp. at 195 (emphases added). The MFJ court applied the nondiscrimination provisions to *protect* AT&T from the BOCs as early as 1984, *see supra*, Part I.B. at 12, and any doubt on this point was resolved conclusively by the D.C. Circuit in the *FTS Case*, *see* Part I.B, *supra* at 12-13, which held that the concerns addressed by the MFJ's equal access and nondiscrimination requirements were not limited solely to favoritism by the BOCs of AT&T. The Court of Appeals affirmed as "eminently reasonable" the MFJ court's conclusion that the MFJ "'was not intended to prevent only discrimination in favor of AT&T or among interexchange carriers, while permitting discrimination against AT&T.'" 846 F.2d at 1427 (*quoting* Dist. Ct. mem.).

As a result, the *Notice*'s observation that "there are no longer any dominant interexchange providers," *Notice* ¶ 11, stands the rationale for equal access and nondiscrimination on its head. These requirements were not designed to protect the BOCs from the exercise of market power by a dominant interexchange carrier, but were instead intended to protect competition in the markets for interexchange and information services by denying the BOCs and other dominant *local* carriers the ability and incentive to stymie interexchange competition.

Given that (i) the BOCs' ability to exploit their control over bottleneck local telecommunications facilities and services remains, and (ii) their incentives to do so have, if anything, increased since the passage of the 1996 Act, it is difficult to imagine *any* rational justification for lifting the equal access and nondiscrimination requirements designed to address these anticompetitive concerns. Certainly none of the *Notice*'s justifications would warrant that outcome.

B. None of The *Notice*'s Proposals Supports Eliminating The Equal Access and Nondiscrimination Obligations Carried Forward In Section 251(g).

Provisions in § 251 other than subsection (g) plainly are insufficient to serve the MFJ's goal of non-favoritism by BOCs. To be sure, some of the equal access and nondiscrimination requirements set forth in the MFJ, and carried over through § 251(g), are also reflected in other provisions of the 1996 Act. *See*, *e.g.*, 47 U.S.C. § 251(c)(2) (setting forth obligations for interconnection); *id.* § 251(b)(3) (requiring all LECs "to provide dialing parity," which was a critical component of the MFJ's equal access requirement).[13] But the equal access and nondiscrimination requirements set forth in the MFJ, 552 F. Supp. at 227, and applied in subsequent decisions discussed above, are not limited to the matters reflected in these isolated statutory obligations. This is true even with regard to the specific obligations in § 251. For

[13] Under § 251(c)(2), ILECs must interconnect for purposes of (A) "transmission and routing of exchange service and exchange access," (B) "at any technically feasible point," (C) "that is at least equal in quality" to that provided by the ILEC to itself or its affiliates, (D) "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."

example, the Commission has interpreted § 251(c)(2)'s "interconnection" mandate as including only "physical linking of two networks for mutual exchange of traffic," and thus as not including access services such as the routing, transport, and termination of traffic. *Competitive Telecommunications Ass'n* v. *FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997) (internal quotation marks omitted). In denying a petition for review of the Commission's interpretation, the Eighth Circuit explained that § 251(g), rather than § 251(c)(2), governs other aspects of interconnection. *Id*. at 1072-73.

Furthermore, § 251(g) remains the sole basis in § 251 for certain critical restrictions on the anti-competitive behavior of the BOCs, including discrimination with regard to provision of customer information and joint marketing efforts such as teaming and marketing during in-bound calls. These include equal access to, among other things, "the provision of information necessary to bill customers." 552 F. Supp. at 228 (§ IV.F, defining "exchange access" and "exchange access services"). Existing rules preserved by § 251(g) specifically require nondiscrimination in the provision of billing information, 698 F. Supp. at 353-54, and, as the MFJ court explained, equal access requires, among other things, that the BOCs "provid[e] all interexchange carriers with identical information at an identical quality level," 604 F. Supp. at 323. Similarly, § 251(g) carries forward the restrictions on BOCs using their local customer service representatives to discriminate among interexchange carriers in any marketing or assistance with regard to interexchange service. It also provides the equal access and nondiscrimination restrictions on the ability of BOCs to "team" with interexchange carriers.

Nor do the Commission's orders under §§ 201 and 202 reduce the need for separate equal access and nondiscrimination requirements in current marketplace conditions (*i.e.*, nascent local competition dependent on BOC facilities, and BOC entry into the long distance market). These same provisions existed at the time of the MFJ but were deemed inadequate. Indeed, the MFJ court, in a related context, rejected arguments that regulations under statutes such as Section 202(a) were an adequate substitute for the requirements of the MFJ:

> [D]espite the decades old requirements in the Communications Act, 47 U.S.C. § 202(a), and various FCC regulations requiring non-discrimination, equal access, and proper cost allocations, and notwithstanding the Commission's own persistent and dedicated efforts for a number of years, the FCC was unable to prevent or to remedy major anticompetitive abuses by the Bell System achieved through the activities of its local affiliates.

United States v. *Western Elec. Co.*, 673 F. Supp. 525, 567 (1987). That analysis applies equally here.

III. THE COMMISSION SHOULD TAKE ADDITIONAL STEPS TO COMBAT THE BOCS' CONTINUING ANTICOMPETITIVE DISCRIMINATION.

The *Notice* does properly recognize, at the outset, that "legal and marketplace changes that have transpired since the earlier requirements were adopted" may require modification of the equal access and nondiscrimination requirements carried forward in the MFJ. *Notice* ¶ 1. Here, the changes to the market for telecommunications ushered in by the 1996 Act warrant imposition of further requirements on the BOCs and other incumbent LECs to address continued and pervasive anti-competitive behavior and the threat of remonopolization of telecommunications services by the BOCs leveraging their historic monopoly positions.

A. The Commission Should Extend Its Restrictions Governing The "LEC Connect" Channel.

The Commission, years ago, recognized that allowing a BOC to steer undesignated traffic to a particular IXC would "clearly accord" that carrier "preferential treatment and give[] it an advantage over its competitors," which is "not predicated on any quality or pricing difference but rather on its historical monopoly position." *Investigation of Access & Divestiture Related Tariffs*, 101 FCC 2d 911, ¶ 22 (1985); *Non-Accounting Safeguards*

Order ¶ 16. More recently, the Commission has explained that even after a BOC has received Section 271 approval, it "must provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the interexchange carriers offering interexchange services in its service area." *Non-Accounting Safeguards Order* ¶ 292.

Experience in States where BOCs have received § 271 approval has confirmed the crushing power of the joint marketing made possible by the BOCs' continuing dominance of the bottleneck and of services related to it — particularly joint marketing on inbound calls in which customers select a long distance provider. Pursuant to Commission decisions, local customer service agents in those States may recommend their affiliate's long distance service in such calls so long as they also mention the availability of other providers;[14] they also may market without restriction when customers call to obtain an additional line.[15] As Dr. Selwyn has explained, Verizon's share of the residential long distance market in New York jumped to 20% in its first year after receiving § 271 authorization and continued to climb precipitously — to about 34.2% — by the end of its second year. Selwyn Decl. ¶ 8 n.11; *id.* ¶ 23.[16] The effect has been similar in Texas and Massachusetts. *Id.* ¶ 23.[17] The trend is toward a remonopolization, the cause of

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[14] *See In the Matter of Application of BellSouth Corp., et al., Pursuant to Section 271 of the Communications Act etc.*, 13 FCC Rcd. 539, ¶¶ 231-39 (1997) ("*BellSouth South Carolina Order*"), *approved in AT&T Corp.*, 220 F.3d at 632.

[15] *See In the Matter of AT&T Corp.* v. *New York Tel. Co.*, 15 FCC Rcd. 19,997 (2000).

[16] *See also* Declaration of Lee L. Selwyn on behalf of AT&T Corp. ¶ 63 (Apr. 8, 2002), *In the Matter of the Inquiry into Verizon Delaware Inc.'s Compliance with the Conditions set Forth in 47 U.S.C. § 271(c)*, PSC Docket No. 02-001 (Del. P.S.C.).

[17] *See also* Declaration of Lee L. Selwyn ¶ 64, *In the Matter of the Inquiry into Verizon Delaware*, PSC Docket No. 02-001 (noting that in Massachusetts, Verizon reported a 17.9% market share 10 months after receiving § 271 authorization, and that in Texas, SBC reported a 19% market share after 10 months).

which is the chokehold on inbound-call joint marketing that the BOCs' *de facto* dominance over local service gives them. Indeed, the BOCs' share of the long distance market appears to be a direct function of their share of the local market. *Id*. ¶¶ 24-25. The BOCs' "preemptive use of the 'inbound channel' in States where they have received § 271 approval "has been the principal explanation for [the BOCs] extraordinary success in acquiring customers in the first two years in which they have been permitted into the long distance business." *Id*. ¶ 23. This phenomenon is one that the Commission rightly foresaw in the *Qwest Teaming Order*, noting that, if local competition is insufficient, interexchange carriers will be harmed by competition from BOCs' affiliates. *Qwest Teaming Order* ¶ 7.

Under the MFJ, the BOCs were obligated to proceed without favoritism to any interexchange carrier. Indeed, the Commission has rightly suggested that the MFJ cases "stand for the proposition that BOCs may not favor an interexchange carrier by endorsing or promoting the services of one interexchange carrier over another." *Qwest Teaming Order* ¶ 57. The BOCs "must facilitate the ability of customers to choose, but remain neutral as a participant in that decision." *Id*. The BOCs' continued efforts to thwart this guarantee, are the best illustration of why the nondiscrimination obligations set forth in § 251(g) (along with § 271(a)) are crucial to ensuring a robust interexchange market for consumers, free of BOC efforts to tip the scales with the weight of their continued monopoly power.

In addition, this rule of non-favoritism in the area of joint marketing, which is carried forward today through Section 251(g), is established by the MFJ court's decision in the *Shared Tenant Services Case*, 627 F. Supp. 1090 (1986).[18] The court recognized that the BOCs

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[18] The question there was the scope of the MFJ's prohibition on BOCs "provid[ing] interexchange telecommunications services." 552 F. Supp. at 227 (§ II.D). The court held that, because the BOCs could not "provide" such service, they also could not resell it, market it as part

would have an incentive "to cooperate with particular interexchange carriers and to favor them in various ways" and would have "a direct financial interest" in favoring the interexchange carriers whose service they had decided to market and sell. 627 F. Supp. at 1100 n.39. This incentive created "a special threat to competition," because the BOCs have the unique ability to "use [their] market power in the provision of exchange access to maximize the interexchange carriers' costs with respect to such access while minimizing the rates paid for interexchange services by its own shared services enterprise." *Id*. at 1102-03.

But even if existing nondiscrimination obligations could be read narrowly,[19] the Commission should extend them to limit the BOCs from unfairly trading on their market power over the LEC connect channel. One of the joint marketing schemes at issue in the *Qwest Teaming Order* case enabled the BOC to cause approximately 130,000 customers to change their

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of a package, or select for inclusion in a package the interexchange service of a particular carrier. 627 F. Supp. at 1100-03. The MFJ court and the D.C. Circuit recognized the same rule in other decisions. *United States* v. *Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990) (rejecting an interpretation of MFJ that would permit BOCs to provide interexchange service "by simply packaging that service with some other noninterexchange telecommunications" service, because such an interpretation "would create an enormous loophole"); *id*., 675 F. Supp. at 665-66 (1987) (interpreting "'provide' or 'provision' [ ] to be synonymous with furnishing, marketing, or selling").

[19] The decision in *In the Matter of AT&T Corp.* v. *NYNEX Corp.*, 16 FCC Rcd. 16,087 (2001), holding that NYNEX's 1-800-54NYNEX calling platform service did not violate § 251(g), failed to address the portions of the *Shared Tenant Services Case* and related decisions discussed above, and also failed to mention either the *Endorsement Case* or the *Equal Access Case*. *See id.* ¶ 24 & n.56. In addition, the Commission expressly did not reach the question whether § 251(g) required a BOC to provide each interexchange carrier an equal opportunity to participate in such a service. *Id*. ¶¶ 23 n.52, 26. Thus, even assuming the correctness of this decision, it does not preclude the conclusion that § 251(g), at a minimum, requires the BOCs to offer any teaming arrangement to all interexchange carriers on the same terms and to permit all interested carriers to participate. This watered-down requirement is, however, inadequate, as a BOC could discriminate indirectly, as in the *Qwest Teaming Order* case, by offering terms tailored to (or against) a particular carrier and, in any event, mass teaming would force all carriers into the same mold, stifling competition under the yoke of the BOCs.

long distance service in just four weeks. *Qwest Teaming Order* ¶ 44. The goal of the MFJ's nondiscrimination requirements was to prevent a BOC from seeking to "shape interLATA competition . . . to meet its own needs." *United States* v. *Western Elec. Co.*, 583 F. Supp. 1257, 1259 (D. D.C. 1984). BOCs are now able to do precisely that, through the exclusive inbound-call marketing opportunity provided by their near-monopoly in the local markets. Selwyn Decl. ¶ 24. *See id.* ¶ 30 ("[O]ver time the BOC's long distance market share would [ ] be expected to grow directly and specifically as a consequence of its ability to preempt competing long distance carriers in signing up new customers").

For example, the restrictions on BOC joint marketing plainly should be extended to customers seeking additional lines. Both the courts and the Commission have acknowledged that BOCs may not discriminate when a customer seeks "new service," defined as "receiv[ing] service from the particular [BOC] for the first time" or "mov[ing] to another location within the [BOC] area." *Equal Access Case*, 578 F. Supp. at 677. Like calls for new service, inbound calls are a prime and pervasive opportunity for discrimination — one that provides the BOCs with a unique marketing advantage by virtue of their control over local telecommunications services. Thus, it is essential that the nondiscrimination obligations reflected in § 251(g) remain viable. *See* Selwyn Decl. ¶¶ 9-11, 21-25 (explaining that control over local facilities provides BOCs with unique access to customers making inbound calls for purposes of marketing services).

In *In the Matter of AT&T Corp.* v. *New York Tel. Co.*, 15 FCC Rcd. 19,997 (2000), however, the Commission concluded that the obligations carried forward by Section 251(g) with regard to inbound marketing applied only to "new service." *Id.* ¶ 10. But the concerns that mandate nondiscrimination during inbound calls for "new service" — *i.e.*, ensuring that interexchange carriers are competing on an equal footing, and preventing the BOCs from extending their market power over local service to other markets — apply regardless of whether the customer is seeking interexchange service for the first time or is seeking a second (or additional) line that will also provide long distance service.

The Commission should extend those nondiscrimination obligations to customer requests for a new telephone line. A customer seeking a new line is not materially different from a customer who "receives services from the particular [BOC] for the first time" or "moves to another location within the [BOC] area." 578 F. Supp. at 677. That customer, like customers in the two scenarios that the MFJ court specified, is, in effect, seeking a "new service." In particular, a customer who seeks a new line stands in the same relation to a BOC as does a customer who moves within the BOC area and seeks service at his new home. Just as discrimination by a BOC in providing a first line can thwart interexchange competition, so also can such discrimination in providing additional lines. The effect of discrimination on the market is the same, and, conversely, the benefits of a nondiscrimination rule to consumers, in expanding their choices, would be the same.

The need to extend the restrictions on BOC joint marketing to second (or additional) lines is underscored by the sea change in the utilization of second (or additional) lines by telecommunications customers. *See* Selwyn Decl. ¶ 17. Current market conditions warrant adoption of a separate rule. According to the FCC's data, second-line penetration was negligible (only 2.7%) in the late 1980s. *Id*. By contrast, as of the end of 1999, 29% of homes with telephones had an additional line. *Id*. As a result, requests for second (or additional) lines constitute a significant market for which BOCs should not be permitted to leverage the advantage of an "inbound channel" based upon their continuing dominance over the local telecommunications market. Moreover, the extent of this growth exacerbates the very real concerns that BOCs, capitalizing upon their "historical monopoly position," are poised to remonopolize telecommunications services in their service areas.

B. The Commission Should Require That A Neutral Third Party Administer Customers' Preferred Carrier Choices, Changes, and Freezes.

The BOCs' dismal record as administrators of customers' preferred carrier choices, changes, and freezes demonstrates that the need for nondiscrimination requirements is not merely theoretical, but affects consumers every day. The problem is certain to deteriorate as BOCs obtain § 271 approval and enter the interLATA market. *See* Selwyn Decl. ¶ 10 (explaining that conduct of BOCs in marketing their interLATA service "compels the inescapable conclusion that not only do BOCs *intend* to make unfair use of subscriber information and unfair use of customer contacts . . . their opportunity to engage in these practices appears to be the principal if not the sole driver of the BOCs' interest in the long distance business in the first place"). These continuing, persistent, and increasing abuses warrant adopting a neutral third party administrator to ensure that these customer choices are administered in a competitively neutral manner.

The evidence of abuse by the BOCs in this area is substantial and continuing. As a committee of the New England Consortium of Public Utility Commissions ("NECPUC") acknowledged in a recent report, "industry stakeholders acknowledged that the carrier change process was flawed."[20] For example, the BOCs have been able to manipulate their near monopoly over the administration of "freezes" on choice of service provider (whether local, intraLATA, or interLATA). In this regard, the Commission has "long recognized that incumbent

[20] NECPUC Consumer Affairs Staff Committee, *"Getting the Customer Out of the Middle," Examining Problems [in] the Carrier Change Process* at 1 (Mar. 19, 2002) ("*NECPUC Report*").

LECs may have the incentive to discriminate in the provision of service to their competitors," and therefore has made clear that they "should not be able to impose discriminatory delays when lifting freezes."[21] Further, the Commission has acknowledged that "preferred carrier freezes can have a particularly adverse impact on the development of competition in markets soon to be or newly open to competition." 14 FCC Rcd. 1508, ¶ 135 (expressing concerns regarding "use of preferred carrier freeze mechanisms for anticompetitive purposes"). It has therefore warned that "preferred carrier freezes should be implemented on a nondiscriminatory basis so that LECs do not use freezes as a tool to gain an unreasonable competitive advantage." *Id.* ¶ 118.

These concerns are well founded. Specifically, the BOCs have sought to impose freezes on primary local operating company ("PLOC") service without any justification, have frustrated the removal of freezes, have imposed freezes on intraLATA service that impede customers' ability to switch service from the BOC, and have frustrated long distance competition through myriad forms of manipulating the PIC selection and PIC freeze system. For example, in New York, Verizon sought permission to provide PLOC freezes in the same month in which it received permission under § 271 to provide interexchange service. *See* Notice Soliciting Comments at 20 (Mar. 23, 2001), *Complaint of AT&T Communications of New York, Inc. Against Bell Atlantic-New York's Management of the [PIC] Program*, Case 00-C-0897 (N.Y. Pub. Util. Comm'n); *see generally AT&T Corp.*, 220 F.3d 607 (aff'g § 271 approval for New York). As a result, the New York Public Utilities Commission deferred action on Verizon's PLOC freeze request, in light of "competitive concerns," and pending review of the entire freeze system in New York. Notice Soliciting Comments at 23.

[21] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 1508, ¶ 118 (1998) ("*Carrier Selection Changes Order*").

Numerous other States have, in just the last few months, recognized the anti-competitive goals and consequences of the BOCs' efforts to impose PLOC freezes. In Iowa, Qwest used the pretext of a few isolated instances of slamming to offer local service freezes. The Iowa Utilities Board on April 3, 2002, rejected this effort as anti-competitive, in light of "the negligible state of local competition in Iowa and the few instances of local service slamming." *Cox Iowa Telcom*, Docket No. FCU-02-01 at 8. The Board ordered Qwest to cease offering local service freezes and to inform customers who had obtained them that the freezes were being terminated. *Id*. at 10. On April 25, 2002, the Montana Public Service Commission imposed an 18-month moratorium on Qwest's PLOC freezes there. Notice of Commission Action at 1, *In the Matter of the Commission's Investigation of Qwest Communication's Implementation of a Local Carrier Freeze Option*, Util. Div. Docket No. D2002.2.14 (Mont. P.S.C., Apr. 25, 2002). The Commission explained that, given the CLECs' "minimal" market share and the difficulty of lifting a freeze, a PLOC freeze would "impede the development of competition" by "locking large numbers of customers" into Qwest's local service. *Id*. at 8. The Commission also noted the absence of any need for such a freeze, given that local service slamming in Montana was "negligible." *Id*. at 8.

Finally, on May 7, 2002, both the Nebraska Public Service Commission and Minnesota Public Utilities Commission reached the same conclusion as did these other States. The Nebraska Commission found Qwest's proposed PLOC freeze program to be "highly suspect" and ordered an indefinite suspension of the program. *See* Findings and Conclusion at 10, *In the Matter of the Comm'n, on its own motion, to investigate the effects of local service freezes in Nebraska*, App. No. C-2662/PI-55 (Neb. P.S.C., May 7, 2002). The Minnesota Public Utilities Commission, noting the absence of any need for PLOC freezes, denied Qwest's request to offer PLOC freezes and ordered Qwest to cease offering them. *In the Matter of Qwest Corp. Local Service Freeze*, Docket No. P421/CI-02-75 (Minn. P.U.C., May 7, 2002).

The concerns of the commissions in Iowa, Montana, Nebraska, and Minnesota have been borne out in Washington State, where AT&T Broadband ("AT&T") has recently been forced to file a complaint against Qwest. Qwest has repeatedly engaged in "reverse slamming" by imposing local service freezes on potential AT&T local customers without their consent and then erecting numerous bureaucratic obstacles to the customers' efforts to remove the freezes. *See* Complaint for Emergency Relief (filed Mar. 2002), in *AT&T Broadband Phone of Washington LLC* v. *Qwest Corp.*, Docket No. UT-020388 (Wash. Util. & Transp. Comm'n Mar. 2002).[22]

As explained in testimony that AT&T recently filed in that case, Qwest, in mid-February, 2002, suddenly began rejecting large numbers of orders to change local service from Qwest to AT&T, informing AT&T that the local customer needed to contact Qwest to remove a PLOC freeze. Direct Testimony of Jonathan Wolf at 6 (filed Apr. 30, 2002), in *AT&T Broadband Phone*. When AT&T informed its affected would-be customers of this requirement, over 95% of them denied authorizing Qwest to impose a freeze, and nearly all informed AT&T that, when they called Qwest, Qwest refused to remove the freeze. *Id*. at 6, 10. Qwest has refused to provide third-party verification of the alleged requests for PLOC freezes, *id*. at 9, and has delayed in numerous ways efforts by AT&T and its customers to correct this problem, *id*. at 8-9. *See Carrier Selection Changes Order* ¶ 121 ("[A]ny solicitation and other carrier-provided information concerning a preferred carrier freeze should be clear and not misleading"). As a

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22 The Florida Public Service Commission is also inquiring into such practices. *Generic Investigation into Whether Competitive Practices of Incumbent and Alternative Local Exchange Carriers Comply with Section 364.01(4)(G)*, Docket No. 011077-TP.

result of Qwest's tactics, the average amount of time it takes customers to obtain local service from AT&T has doubled, *id*. at 10, and AT&T has lost at least 20% of the affected customers, *id*. at 11.[23]

Similar anti-competitive actions have occurred with regard to preferred carrier freezes on intraLATA toll services. BOCs facing new competition have routinely engaged in "jamming." If a customer had a freeze on his choice of preferred carrier for interLATA service, the BOC, as soon as intraLATA competition commenced, "extended" this freeze to his choice of intraLATA toll carrier, thus automatically appointing itself — the prior monopoly provider — the frozen carrier for all intraLATA calls, without the knowledge or consent of the customer. Thus, a customer seeking to switch from the BOC to one of its competitors faced significant hurdles, first in discovering and then in lifting the freeze.

In addition, there is reason to believe that the BOCs were imposing intraLATA freezes even on customers who did not have them for local service. In New York, for example,

[23] Another tactic of BOCs to thwart local competition is to use predatory pricing and other tactics to "winback" local customers who have switched their local service from the BOC to a CLEC. *See* MCI's Comments in Support of Staff's Motion to Initiate Investigation, Attachment B (filed Apr. 25, 2002), *In the Matter of a General Investigation into Winback/Retention Promotions and Practices*, Docket No. 02-GIMT-678-GIT (Kan. Corp. Comm'n) ("Your local service has been changed from Southwestern Bell to another local service provider. . . . If the change was made without your knowledge, you may have been slammed"). BOCs can use targeted winback efforts, including discount pricing, to stifle the emergence of CLECs, while maintaining higher prices in areas where CLEC entry is unlikely. In response to this dynamic, the Staff of the Public Utility Commission of Texas recently has recommended that the Texas Commission bar winbacks by ILECs within 30 days after a customer has switched to a CLEC, limit discounts and terms in winback promotions, and restrict retention offers. Memorandum (Apr. 12, 2002), *Agenda Item No. 24, Project No. 24948—Investigation of Winback/Retention Offers by Chapter 58 Electing Companies* (Tex. P.U.C.). The Staff warned that "winback/retention offers can be used to selectively target marginally competitive market segments to the detriment of competition, especially in the early stages." *Id*. at 1. The Public Utilities Commission of Ohio, on April 11, 2002, likewise imposed a temporary 30-day waiting period on winback efforts by Ameritech. *See* Lin-Fisher, "Ameritech's Pitch Must Wait," *Akron Beacon Journal* (Apr. 12, 2002).

when competition began for intraLATA toll service (but before Verizon had begun offering interLATA service), interexchange carriers noticed a "disparity between Verizon's percentage of intraLATA PIC freezes versus interLATA PIC freezes." Notice Soliciting Comments at 15. The New York Commission ruled the issue worthy of further investigation. *Id*. at 17. AT&T also was forced to take action against U.S. West for jamming in Colorado, Utah, New Mexico, and Oregon. In Colorado, U.S. West's jamming deprived over 200,000 customers free choice in intraLATA service. Formal Complaint (Apr. 12, 1999), *AT&T Communications of the Mountain States, Inc.* v. *U.S. West Communications, Inc.*, Docket No. 99F-162T ¶ 25 (Pub. Util. Comm'n of Colo.).[24]

The BOCs have also been abusing their bottleneck position in the administration of PIC freezes for interLATA service, particularly as they prepare (or begin) to compete for interLATA service. Under the current regulatory system, LECs (thus primarily BOCs) alone administer PIC freezes for customers. In New York, Verizon has taken unfair advantage of the opportunity to discriminate between its own long distance affiliate and competing interexchange carriers in imposing or lifting PIC freezes – an opportunity it has not hesitated to exploit. *Cf. Carrier Selection Changes Order* ¶ 119 (imposing nondiscrimination requirement). Among other things, Verizon provides its affiliate a superior service for determining a potential customer's PIC freeze status (and thus, if necessary, assisting the customer in lifting the freeze), charges competitors for PIC information that it provides to its affiliates for free, and assists would-be customers of its affiliate in lifting freezes in ways that it does not assist would-be

[24] The Commission has sought to thwart this discriminatory, anti-competitive practice of "account-level" freezes by promulgating regulations requiring that PIC freeze procedures "clearly distinguish among" levels of service and that a carrier offering a freeze "obtain separate authorization for each service" for which a freeze is requested. 47 C.F.R. § 64.1190(c).

customers of competitors, such as by providing a special code. Notice Soliciting Comments at 7-12, 14-15; Order Requiring Non-Discriminatory Provision of PIC Freeze Status Information and Clarifying Prior Order at 2-3 (Oct. 30, 2001), *Complaint of AT&T Communications of New York*.[25]

AT&T objected that "each year, Verizon rejects hundreds of thousands of bona fide customer requests to change preferred carriers because neither the customer nor the carrier has an effective means of determining that a PIC freeze is in place before submitting an order that requests a PIC change." Notice Soliciting Comments at 17. The New York Public Service Commission ("NY PSC") thus ordered Verizon, "when selling long distance services," not to "provide the customer with the [Voice Response Unit] security code or otherwise utilize its access to the account number in a way that its competitors cannot." *Id*. at 10. It ordered more generally that Verizon "provide long distance carriers with access to PIC freeze status information that is equivalent to that provided to Verizon's own customer service and sales personnel." Order Requiring Non-Discriminatory Provision of PIC Freeze Status Information at 6; *see id*. (ordering Verizon promptly to provide "parity of access to PIC freeze status information"). Echoing the Commission's mandate that LECs "should not be able to impose discriminatory delays when lifting freezes," *Carrier Selection Changes Order* ¶ 119, the NY

[25] The opportunity for such discrimination always exists, and the incentive is certain to exist wherever a BOC has a long distance affiliate. *See* Declaration of Jacqueline Von Schmidt With Respect to a Neutral Third Party Administrator for PIC Administration at 4, ¶¶ 4-5 (Aug. 23, 2001), *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services etc.*, R.93-04-003 (Cal. Pub. Util. Comm'n) ("Von Schmidt Decl.") ("Pacific's long distance affiliate will have real time access to Pacific's record of any and all customer PIC freezes." By contrast, "[a]ny IXC that submits to Pacific a properly authorized customer request to change carrier to the IXC, risks the possibility that Pacific may reject the order on the basis of a PIC freeze" that the IXC did not know about. "Through no fault of AT&T, or any other IXC, customers will perceive Pacific to have more efficient customer service abilities.")

PSC ordered that Verizon not offer to customers switching to its own toll service "more efficient processes for lifting PIC freezes than it offers to its competitors," Notice Soliciting Comments at 15.

Yet AT&T's most recent submission in that case demonstrates, with several scripts of service calls to Verizon, that the discrimination continues, with Verizon agents ignoring freezes in order to sign up new Verizon long distance customers and imposing freezes without seeking the new customer's consent. *See* Letter from Harry M. Davidow, AT&T, to Hon. Janet H. Deixler, NY PSC (Jan. 18, 2002), Case 00-C-0897 (comments on Verizon's Compliance Plan). Further, the § 272 audit of Verizon in New York, although deficient in many ways, produced evidence that Verizon consistently discriminates in the time necessary to process PIC changes. *See Comments of AT&T Corp. on Verizon's Section 272 Compliance Biennial Audit Report* at 19-20 (filed Apr. 8, 2002), CC Docket No. 96-150.

A related, and increasingly common, tactic is to miscode PIC changes as PIC disputes, charge PIC dispute fees (based upon an alleged, rather than adjudicated, slam), and report the miscodes as "slams." The Commission recently began investigating allegations by AT&T and MCI WorldCom that Pacific Bell Corp. and Southwestern Bell Corp. have engaged in such conduct, EB File No. EB-01-TC-061, and the Consumer Service Division of the California Public Utilities Commission has recommended an outside audit of Pacific Bell's practices, Compliance Filing of the CSD (Aug. 7, 2001), *AT&T* v. *Pacific Bell*, PUC No. 99-12-029. This practice is a result of BOCs acting on new incentives, and exploiting new opportunities, in the changed market conditions.[26]

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[26] *See* Von Schmidt Decl. at 6, ¶ 7 (Noting that, because PIC dispute process provides no opportunity to investigate a claimed slam, "there is ample opportunity and incentive for a LEC in direct competition with the IXC in the local, toll and/or long distance market, such as Pacific, to

The problem with BOC administration of preferred carrier choices, changes, and freezes, is that BOCs have a conflict of interest, and that conflict is only growing. As one analysis, independent of the interexchange carriers, has concluded:

> [S]lamming and PIC Freeze problems can be expected to worsen as the incumbent Bell companies—formerly considered neutral parties suitable to collect and administer PIC information from customers — are being given authority to compete for long distance customer[s]. The incumbent BOCs were moderately successful in helping to prevent "slamming" in the past. Now, as they compete with long distance companies to win customers, they have no incentive to act in a neutral manner to administer customer PIC information.
>
> . . .
>
> [I]f an acceptable solution is not found, these problems will actually serve as a barrier to competition; if customers are unable to move freely between carriers[,] and carriers see their addressable market shrinking as a result, then competition and the consumer lose.

NeuStar, Inc., "PIC and CARE Administration" at 2 (Aug. 2001), available at *www.neustar.com/support/whitepapers/index.cfm*. In other words, the fox is now guarding the henhouse.

In response to this inherent conflict of interest, several State public utility commissions have been considering the solution generally referred to as a Neutral Third Party Administrator. This solution would involve a Neutral Third Party ("NTP") maintaining a centralized database and/or a clearinghouse of customer-account information (such as telephone

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submit these PIC dispute invoices in order to charge the IXC the change fee for customers who switch back to Pacific's service"). Further, the District of Columbia Public Utility Commission has recognized that Verizon has been trying to extend this abuse to the local service market and rejected a PIC change plan of Verizon D.C., which included a provision for Verizon to impose a charge for slamming before the Commission had investigated the allegation of slamming. *See* Order, ¶¶ 14-16, *In the Matter of Application of Verizon Washington DC, Inc., for Authority to Amend General Index and General Regulations Tariffs*, Order No. 12041 (June 25, 2001).

numbers, name and address, and preferred carrier freeze status for each service level) for real-time queries during sales calls and also administering all customer preferred carrier choices, changes, and freezes. The NTP proposal would be a deregulatory alternative to the existing nondiscrimination requirements of § 251(g). Such an alternative would largely eliminate the regulatory burden in resolving preferred carrier disputes (whether between carriers or between carriers and customers and for and for all services, including local, intraLATA, or interLATA), would facilitate regulatory monitoring of carrier behavior with real-time data while reducing the need for monitoring, and would eliminate the need for additional regulation to address slamming, cramming, BOC discrimination, and consumer frustrations related to preferred carrier freezes. NeuStar, Inc., "PIC and CARE Administration" at 3.[27]

In New York, the Public Service Commission in March 2001 observed that in light of Verizon having received § 271 authorization, Verizon might no longer be capable of providing the neutral "gatekeeper" functions necessary for competition: "Under these circumstances, a system based on Verizon as the freeze gatekeeper may no longer be appropriate. Rather, a more neutral system should be considered." Notice Soliciting Comments at 23. Accordingly, the Commission solicited proposals for alternatives. In response, the New York Attorney General, in agreement with comments made by AT&T, recommended that Verizon, in light of its "entry into long distance, and its dominant share of the regional market" no longer be

[27] Both the New England States and New York have given increasing attention to this solution for the conflict-of-interest problem. In July 2000, NECPUC held a seminar with industry representatives to discuss customer service problems arising from carrier-to-carrier interactions. An industry workgroup that NECPUC established produced a proposal in April 2001 regarding NTP, and the NECPUC Staff Committee on Consumer Affairs, which was overseeing this process, debated the proposal in 2001. On March 19, 2002, the Staff Committee recommended that NECPUC "explore the NTP proposal more fully" and eventually "consider requesting the FCC initiate a proceeding on the national introduction of the NTP proposal." *NECPUC Report* at 5.

the gatekeeper of the preferred carrier freeze system but that, instead, "a competitively neutral PIC freeze system be administered by an independent entity that will treat all competing providers equally." Reply Comments of Eliot Spitzer, Attorney General of the State of New York, Regarding PIC Freeze Proposals at 8 (June 8, 2001), in *Complaint of AT&T Communications of New York, Inc.* As the Attorney General noted, transfer to a NTP would also facilitate administration of local-provider freezes, an area where the BOCs' conflict of interest is even greater than with interexchange service. *Id*. at 8. The Commission's consideration of the NTP solution is pending.

Thus, the NTP proposal already is under serious consideration. Indeed, this Commission itself has taken a step toward this solution, endorsing, in its preferred carrier freeze regulations, the use of an "independent third party" to confirm requests for preferred carrier freezes. 47 C.F.R. § 64.1190(d)(2)(iii); *see also* 47 U.S.C. § 251(e)(1) (mandating a similar approach for administering telecommunications numbering). The proposal is an improvement upon the MFJ's nondiscrimination requirements in an area where, in light of the new market conditions created by the 1996 Act, the existing requirements have become inadequate.

Therefore, the Commission should initiate a rulemaking proceeding to address the propriety of having a third party administrator as the universal preferred carrier change administrator for all carriers.

C. The Commission Should Impose Mandatory Customer Account Record Exchange ("CARE") Obligations On All Local Exchange Carriers.

There is also a pressing need for all carriers to be subject to the same mandatory requirements regarding the accurate and timely exchange of customer information. The exchange of this information, provided by the LECs, is important because it allows carriers to establish customer accounts and bill accurately, to execute and confirm customer orders and customer transfers from one carrier to another, and to avoid inadvertently slamming or cramming customers. The industry standard process governing these exchanges, established by the Open Billing Forum of the Alliance for Telecommunications Industry Solutions, and known as CARE, currently is conducted voluntarily by interexchange carriers, major ILECs, and some CLECs, but minimum CARE standards should be made mandatory for *all* LECs.[28] Indeed, at present, there is no other *reliable* alternative for a carrier to receive timely, accurate and reliable data regarding a customer's billing information.

The CARE system was developed on the heels of the MFJ "to facilitate the exchange of . . . [customer] account information" between LECs and IXCs. *See* Order Billing Forum, ATIS/OBF-CARE-012, § 1.4 (Jan. 2001). Through it, the BOCs sought to provide services necessary to process subscription changes so that they would comply with their obligation to provide interexchange access that is "equal in type, quality, and price, to that provided to AT&T and its affiliates." *Id.* § 1.1, at 1-1 (quoting MFJ).

The current system for carrier-to-carrier exchange of CARE, however, was designed when ILECs could not compete for long distance and local markets were not open to competition. The ILEC served as the communications "hub." With the advent of the 1996 Act,

[28] To facilitate the equal access and cooperation among telecommunications providers mandated by the MFJ, the industry created the Alliance for Telecommunications Industry Solutions ("ATIS"), originally known as the Exchange Carrier Standards Association. The Carrier Liaison Committee of ATIS in turn created the Ordering and Billing Forum ("OBF") to establish guidelines for administering the equal access carrier selection process. OBF established voluntary industry standards for Customer Account Records Exchange ("CARE") among carriers. These standards, known simply as CARE, were developed to facilitate the exchange of end user account information. CARE generically identifies data elements that might be shared between carriers and supports a data format intended to facilitate the mechanized exchange of that information. It aims to provide a consistent definition and data format for the exchange of common data elements. Most ILECs and IXCs participated in CARE prior to the 1996 Act.

new, competitive LECs would, in theory, replace the ILEC as the communications hub, on a voluntary basis, as to their own customers. In practice, however, many new entrants do not provide CARE, or do not provide it timely or with a quality or format upon which IXCs can depend. This situation has several intolerable effects.

First, unlike the ILEC who has immediate access to customer service records for local service, IXCs often do not know who their customers are. Instead, IXCs must depend on the LECs not only to execute customer switches in an unbiased manner, but also to provide timely exchange of CARE so that the IXC will know both (i) whether a customer remains on its network, has switched to another carrier, has had his dial tone disconnected, or has made significant changes to the account (*e.g.*, changing billing name and address, telephone number, or responsible party), and (ii) who the customer's local exchange carrier is for the purpose of submitting customer orders. For example, if an IXC's customer switches to a new LEC for local service, the current notice that is sent – albeit, not universally – to the customer's IXC only explains that the customer has left the LEC for local service; in some cases, it may also identify the customer's new LEC. In addition, under the present system, the notice does not inform the IXC whether the customer retained his former IXC for intraLATA toll or interLATA service or instead subscribed to another carrier when he switched his local service. Adding to this informational problem, even LECs that purport to provide CARE regarding a change in carriers do not do so in a uniform manner across the country. *See NECPUC Report* at 3. As a result, there is no effective industry infrastructure in place to support the customer's ability to move seamlessly from one carrier to another.

Second, an IXC, faced with this information vacuum, confronts a Hobson's choice that harms either the IXC or the customer. On the one hand, an IXC can wait and see if a new LEC provider advises it through the voluntary CARE system (or by some other means) that the customer has chosen to remain with that IXC for long distance service. During that period, the IXC may be billing the customer even though the customer has, unbeknownst to the IXC, changed his primary long distance carrier. From the customer's perspective, this may result in double billing. Alternatively, the IXC can assume that the customer no longer desires its service and therefore disconnect his calling plans. If this assumption is wrong, the customer, in continuing to use the IXC, finds himself suddenly being billed at higher "basic" rates. Either way, the consumer's choice of carrier for intraLATA toll or interLATA service is compromised, and IXCs may be accused of violations of continued billing, "cramming," "slamming," or truth-in-billing requirements solely because they never received accurate, timely and complete information regarding their customer's account.[29]

Third, these difficulties cause customers to perceive that the IXCs offer poor service when, in fact, the IXCs are at the mercy of a flawed CARE system. And, when an ILEC enters into competition against the IXCs, the potential for abuse of this essentially voluntary system escalates because the ILEC (and its long distance affiliate) are directly competing for the same pool of customers. The possibility for the affiliate to benefit from the ILEC's superior customer information is great. Once again, ILECs given both the ability and incentive to discriminate can be counted on to do so.

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[29] NECPUC recently reported regarding the types of unauthorized billing problems that a customer can face as a result of this information vacuum: (i) billing at casual rates by the old carrier for a time after switching carriers; (ii) billing at casual rate by the new carrier for a time after switching; (iii) billing by the underlying carrier of the reseller, rather than by the reseller chosen, (iv) "pop up billing," *i.e.*, monthly, non-usage related fees being billed by old carrier months after consumer switched carriers; and (v) continued billing by the old carrier monthly of non-usage related fees after consumer has switched carriers. *NECPUC Report* at 1.

A mandatory and uniform CARE system would address these concerns by ensuring that all service providers have timely and accurate information necessary to provide proper service and billing to its customers. Such a system would not be difficult to establish. AT&T, in conjunction with NeuStar, Inc., has already developed and begun a CLEC CARE clearinghouse. Although few CLECs have participated in it to date, it is one already-existing mechanism for implementing such a mandate. A mandatory CARE system recognizes the new reality that customers may choose different local exchange providers and that the ILECs' incentives have changed. It would require LECs that currently do not participate in CARE to provide information that is essential to providing equal access to IXCs in connection with customer preferred carrier choices, changes and freezes. Further, as to LECs already participating in CARE, a mandatory obligation would impose a level of uniformity that would only enhance the quality and utility of the information currently provided to IXCs.

Therefore, the Commission should initiate a rulemaking proceeding to address the issue of imposing mandatory minimum CARE requirements on all LECs in order to provide uniform, timely, and complete CARE data.

IV. IT WOULD BE IRRATIONAL TO EXTEND THE EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS TO NONDOMINANT CARRIERS.

Section 251(g) does not preserve any equal access or nondiscrimination requirements for nondominant carriers who did not operate as LECs prior to the enactment of the 1996 Act. *See* 47 U.S.C. § 251(g). Indeed, in several circumstances, the 1996 Act, by its terms, treats CLECs differently from the BOCs. That difference in treatment reflects Congress's view that BOCs are not similarly situated to nondominant carriers. Many of the obligations imposed on BOCs that are essential given their market power over local facilities would serve no competitive purpose if applied to nondominant carriers that are just entering into the market for local telecommunications services.[30] They would, ironically, impede the birth of local service competition, by raising the costs of entry.

Given the wide gulf between their competitive circumstances and their ability to impede the development of competition, it would make no sense to disregard these controlling distinctions and instead insist upon regulatory harmony to further some amorphous goal of regulatory tidiness. Thus, whatever the merits of the *Notice*'s suggested goal of harmonizing the obligations all similarly situated LECs, that goal does has no bearing on CLECs vis-à-vis BOCs.[31]

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[30] Although the BOCs, by virtue of their size, pose the biggest obstacle to competition, there is no reason to treat incumbent independent local exchange carriers any differently from BOCs. As the Commission has repeatedly found, independent incumbent LECs have monopoly control over bottleneck local exchange facilities. *See, e.g.,* Second Report and Order, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, et al.*, 12 FCC Rcd. 15756, ¶¶ 158-59 (1997). Specifically, the Commission explained that "absent appropriate and effective regulation," independent incumbent LECs therefore "have the ability and incentive to misallocate costs" from their long distance services to their local exchange services, which would "distort price signals" and "cause substantial harm to consumers, competition, and production efficiency." *Id.* ¶ 159. Indeed, these LECs also "potentially could use [their] market power in the provision of exchange access service to advantage [their] interexchange affiliate[s] by discriminating against the[ir] affiliate[s'] interexchange competitors" in the provisioning of access. *Id.* ¶ 160. As the Commission has noted, these forms of discrimination would be "difficult to police" because "the level of [LEC] 'cooperation' with unaffiliated interLATA carriers [would be] difficult to quantify." *Id.* ¶ 111.

[31] Nor should the obligations imposed upon BOCs with market power differ if they provide interLATA services on an integrated basis. Plainly, Congress provided that even when the other obligations of Section 272 cease to apply to such LECs, nondiscrimination obligations shall continue to apply. *See* 47 U.S.C. § 272 (f) (providing that requirements of Section 272(e) will continue to apply); *id.* § 272(e) (providing that the BOC and its affiliate "shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate . . . unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions." 47 U.S.C. § 272(e)(2). Plainly, Congress intended that BOCs should not be permitted to cross-subsidize the long distance services of their affiliates even after the subset provisions of section 272 have taken effect. As a result, there is no legitimate basis for concluding that the requirements of Section 251(g) no longer should apply under these circumstances.

In short, the Commission therefore should not extend to nondominant carriers the equal access and nondiscrimination requirements that apply to the BOCs through § 251(g).

CONCLUSION

For the foregoing reasons, the Commission should: (i) continue the equal access and nondiscrimination obligations carried forward through Section 251(g); (ii) enforce restrictions on joint marketing to minimize the BOCs' ability to leverage their bottleneck control over the LEC connect channel as a means of marketing services offered by their long distance affiliates, and extend the existing joint marketing restrictions to all customer requests for additional lines, inquiries, and changes to their service; (iii) issue a proposed rulemaking to assess the propriety of a neutral third-party administrator to handle customers' preferred carrier choices, changes, freezes, and related issues in a competitively neutral manner; (iv) mandate that all LECs provide uniform, timely, and complete CARE data, and (v) refrain from extending the equal access and nondiscrimination requirements to nondominant carriers.

Respectfully submitted,

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